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In the Supreme Court of the United States

CASE NO. 75-1352

BEHRING CORPORATION,
a Delaware corporation,

Petitioner,

vs.

WILLIAM R. BENNETT, et al,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN AND FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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A.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 40 (h)(3), Respondents make no separate statement of the case but instead correct Petitioner's statement in the following respect:

Petitioner claims that "it is clear" that Respondents'

> "position is based *entirely* upon the argument that the requirement for an "affirmative act" (payment) renders sections 6 and 7 void and, hence, the proper subject of a rescission action." (Br. 14)(Emphasis added.)

This is misleading. At three different places in its Brief, Petitioner quotes the trial court's class and *subclass* definitions (Br. 12, 17-18, App. 8-9). It is true that the class seeks relief on the basis that certain Deed Restrictions filed by Petitioner are not valid restraints on alienation because they require the performance of affirmative acts by Respondents. What Petitioner's Brief leaves out is that Counts III and IV of the complaint also allege a cause of action on behalf of a *subclass* that was certified by the district court pursuant to Fed. R. Civ. P. 23(c)(4). The subclass includes those Respondents who entered into a contract with defendant whereby defendant covenanted to supply a "warranty deed conveying title free and clear of all encumbrances." The basic claim of this subclass is that Petitioner has breached its contract by failing to supply the requisite warranty deed.

B.

REASONS FOR DENYING THE WRIT

In this case, Petitioner claims that the Fifth Circuit's Order dismissing the appeal conflicts with several Supreme Court and appellate court decisions (Br. 3). Interestingly, several of the allegedly conflicting appellate court decisions were cited by the Fifth Circuit as supporting its order (App. 12). Petitioner's Brief never explains why those decisions are in conflict with the Circuit Court's order. Nor does Petitioner attempt to explain why the Circuit Court's order conflicts with the Supreme Court cases cited by Petitioner. Petitioner's failure to establish a conflict with appellate court or Supreme Court precedent has a simple reason: There is no conflict. The Fifth Circuit's ruling in the instant case was quite obviously a holding posed on all the evidence that the trial court's order under Rule 23 is not appealable. No case has held that such a ruling is beyond the power of any appellate court. The unanimous opinion of the Fifth Circuit Court of Appeals based on the briefs, a voluminous record, and the contentions of the parties on oral argument was that this matter does not fall within "that small class" of cases for which interlocutory review is proper. Petitioner's Brief gives no reason why the appellate court's holding should not stand.

Instead, the arguments in Petitioner's Brief repeat virtually verbatim the arguments previously presented in Petitioner's Brief before the Fifth Circuit. *Compare* Br. 19-35 *with* Brief of Appellant before the Fifth Circuit in No. 74-3055 at 7-23.

Petitioner does go on in its current Brief to argue briefly that several cases support the appeal Petitioner's

use of these cases is, to say the least, unpersuasive. For example, Petitioner cites *Parkinson v. April Indus., Inc.*, 520 F.2d 650 (2d Cir. 1975) as embracing a "three pronged" test for use in deciding whether a class action is appealable. (Br. at 38). Petitioner goes on to claim that: "As already shown, the present case does satisfy all three of these requirements and should be granted review." Id

Petitioner's Brief conveniently overlooked some key facts. Specifically, Petitioner failed to inform this Court that:

1. The three pronged test referred to in Parkinson was developed by the Second Circuit in *General Motors, Inc. v. City of New York*, 501 F.2d, 639 (2d Cir. 1974);

2. The applicability of the three pronged test as set forth in the *General Motors* case was presented to and debated before the Fifth Circuit at length. *See*, e.g., Reply Brief of Appellant Before the Fifth Circuit in No. 74-3055 at 3-6.

3. The Fifth Circuit clearly considered the "three prong" test and found that Petitioner did not satisfy it. This is indicated by the Circuit Court's citation of the *General Motors* case in its order dismissing the appeal (App. 12)*

*Other examples of the shallowness of Petitioner's legal authority abound. Thus, Petitioner purports to rely on a string of Second Circuit cases. *Herbst v. International Telephone & Telegraph Co.*, 495 F.2d. 1308 (2d. Cir. 1974); *Kohn v. Royall, Koegel & Wells*, 496 F.2d, 1094 (2d Cir. 1974) and the *General Motors* case. Nowhere does Petitioner attempt to explain how its case fits the appealibility test established by *Kohn* and *General Motors*. This is a curious oversight in view of the Fifth Circuit's holding that Petition did not satisfy the Second Circuit's "three pronged test".

As this example indicates, the instant Petition is, at bottom, warmed over argument that was considered and unanimously rejected by the Court of Appeals for the Fifth Circuit. In *Eisen v. Carlisle & Jacqueline*, supra, this Court noted that interlocutory appeals are proper in only a *small class* of cases. Certainly this Court meant what it said, as testified to by the recent denial of certiorari in *Sciffer v. Topsy's, Int'l. Inc.*, 520 F.2d, 795, (10th Cir. 1974) *cert denied sub nom. Touche Ross & Seiffer*, 96 S.Ct., 779 (1976) and *Blackie v. Barrack*, 524 F.2d, 891 (9th Cir.), cert denied sub nom. *Touche Ross & Co. v. Fabrikant*, 96 S.Ct. 424 (1975) which were relied on by the Fifth Circuit (App. 12).

The record here is barren of reason why that small class should be greatly enlarged to accept the instant appeal. A decision on the merits in this case has been postponed for over two years by procedural delay. It is time that Petitioner's actions were put to the test of trial.

C.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for a Writ of Certiorari be dismissed.

Respectfully submitted,

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By _____
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I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent was mailed to Gilbert A. Haddad, Esq., Attorney for Petitioner, Fifth Floor, Concord Building, Miami, Florida 33130, this 9 day of April, 1976.

By _____
Of Counsel